

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

JEFF BAIROS MOREIRA,

Appellant

v.

G1-13-259

DEPARTMENT OF CORRECTION,

Respondent

Appearance for Appellant:

Pro Se

Jeff Bairos Moreira

Appearance for Respondent:

Earl Wilson, Esq.

Department of Correction

One Industries Drive: P.O. Box 946

Norfolk, MA 02056

Commissioner:

Christopher C. Bowman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Jeff Bairos Moreira (Mr. Moreira), filed an appeal with the Civil Service Commission (Commission) on December 2, 2013, regarding the decision of the Department of Correction, the Appointing Authority (DOC), to bypass him for appointment to the position of Correction Officer I (CO I). A pre-hearing conference was held on January 7, 2014², and a full hearing was held on February 27, 2014 at the offices of the Commission.³ The hearing was digitally recorded.⁴

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

² As part of the pre-hearing conference, I ordered DOC to provide the pro se Appellant with the employment history of the 182 appointed candidates, with any appropriate redactions. DOC failed to comply with that order. As a result, I reserved the right to designate facts adversely to DOC.

³ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

FINDINGS OF FACT:

Eight (8) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For DOC:

- James O’Gara, Personnel Analyst III;

For Mr. Moreira::

- Jeff Moreira, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, and reasonable inferences therefrom, establishes the following:

1. Mr. Moreira is 24 years-old and resides in Taunton, Massachusetts. He graduated from Bristol Plymouth Regional Technical High School and received an Associates degree in criminal justice from Massasoit Community College. Mr. Moreira is also certified as an EMT. (Testimony of Mr. Moreira and Exhibit 2) He has a license to carry a firearm and is a member of the Massachusetts Deputy Sheriffs’ Association. (Exhibit 4)
2. As one of his personal references, Mr. Moreira provided the name of his girlfriend’s mother. She described Mr. Moreira as a “super mature young man” who is “dependable, responsible and very even tempered.” She stated that Mr. Moreira is “very respectful, polite, giving and treats her daughter with the utmost respect.” (Exhibit 4)
3. Mr. Moreira’s neighbor provided positive feedback about Mr. Moreira during the background investigation and stated that Mr. Moreira took pride in his appearance. The

⁴ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

background investigator's home visit, which included an interview with Mr. Moreira's mother, was also positive. (Exhibit 4)

4. While in high school, Mr. Moreira began working at Market Basket in Raynham, Massachusetts. He was employed there for approximately three (3) years. (Testimony of Mr. Moreira and Exhibit 2) His former employer described Mr. Moreira as a "mature young man" who had good relationships with supervisors and co-workers. They would re-hire him and would recommend him for the position of Correction Officer. (Exhibit 4)
5. After graduating from high school, Mr. Moreira began working at DW Clark in Taunton, a foundry that produces castings. He has been continuously employed at DW Clark on a full-time basis since 2009. The sales manager at DW Clark described Mr. Moreira as a "mature young man" who "reports to work every day on time, makes positive contributions to the company and has received merit raises for his good work." His employer stated that he would re-hire Mr. Moreira "in a heartbeat" and would give his "100% recommendation" toward Mr. Moreira's desire to be a Correction Officer. (Exhibit 4)
6. In order to pursue his dream of a career in law enforcement, Mr. Moreira began working part-time as an overnight dispatcher in the Duxbury Police Department in 2012. He was employed there on a part-time basis for four (4) months, before accepting a part-time dispatcher position in Lakeville, which was closer to home. He was never subject to any discipline and the Police Chief's administrative assistant stated that Mr. Moreira would be eligible for re-hire. (Exhibit 4)
7. As an employee at DW Clark, Mr. Moreira works from 7:00 A.M. to 4:00 or 5:00 P.M. Monday to Friday. As a part-time dispatcher in Lakeville, he worked mainly weekends from 11:00 P.M. to 7:00 A.M. For two months, Mr. Moreira worked all of the shifts that he was

scheduled for, but was unable to pick up additional shifts when requested. (Testimony of Mr. Moreira)

8. After two (2) months of working full-time at DW Clark and then working overnight shifts as a dispatcher, Mr. Moreira realized it was more than he could handle and that it was “too much on [his] body.” (Testimony of Mr. Moreira)
9. When he reported to work for an overnight dispatcher shift in Lakeville one night, he spoke to the head dispatcher and let her know he could not continue working the overnight shifts and was not able to give a traditional two (2)-week notice. He finished his final shift that night and ended his employment in Lakeville. Several months later, Mr. Moreira wrote a letter of apology to the Police Chief regarding his resignation and the lack of a two-week notice. (Testimony of Mr. Moreira and Exhibit 8)
10. In March 2012, Mr. Moreira took and passed the civil service examination for Correction Officer I. He received a score of 85. (Stipulated Facts)
11. His name appeared tied for 62nd on Certification No. 00974 issued to DOC by the state’s Human Resources Division (HRD) on July 2, 2013 from which DOC ultimately appointed one hundred eighty-two (182) candidates, 26 of whom were ranked below Mr. Moreira. (Stipulated Facts)
12. As referenced above, DOC conducted a background investigation of Mr. Moreira, which noted the positive references from previous employers, a neighbor and his personal references. (Exhibit 4)
13. The background investigator’s summary of Mr. Moreira listed the following “positive employment aspects”: “Applicant maintains a neat appearance; Responsible; Dependable; Honest; Experience as a police dispatcher; Motivated to Succeed.” Under “negative

employment aspects”, the background investigator wrote one entry: “was not eligible for rehire at one job.” (Exhibit 4)

14. The entry under negative employment aspects related to the background investigator’s conversation with the Lakeville Police Chief, where Mr. Moreira had resigned as a dispatcher without notice. The Lakeville Police Chief stated that Mr. Moreira had “fizzled out”. According to the background investigator’s report, the Lakeville Police Chief told him that “he probably would not rehire the applicant because he did not fulfill his promise of working a certain length of time and hours for the department, adding they would call him for work and he would decline the offer to come in.” The Police Chief also stated, however, that “he would recommend the applicant for the position of Correction Officer adding the applicant didn’t seem like a bad guy overall and was a functional employee when he worked.” (Exhibit 4)
15. Personnel Analyst III James O’Gara is responsible for coordinating the review of background investigations completed for Correction Officer candidates. He has been employed by DOC for approximately (8) years and has another ten (10) years of prior experience working in a correctional facility. (Testimony of Mr. O’Gara)
16. According to Mr. O’Gara, he does not make the decision regarding which candidates to bypass for appointment, nor does he make a recommendation in this regard. (Testimony of Mr. O’Gara)
17. Although the Appointing Authority for DOC is Commissioner Luis Spencer, it is undisputed that he plays no role in the appointment process.
18. Karen Hetherson is DOC’s Assistant Deputy Commissioner for Administration. The Assistant Deputy Commissioner for Administration oversees DOC’s Personnel Unit which:

“develops, monitors and implements all Department personnel transactions by coordinating all Department’s personnel actions, policies and procedures to ensure hiring, promotions, transfers and all human resources programs are effectively and efficiently administered.”

(www.mass.gov/doc) There was no evidence presented showing that the Assistant Deputy Commissioner for Administration played any role in the appointment process, including the review of bypass decisions.

19. At some point during the selection process, Mr. O’Gara met with Erin Gotovich, DOC’s Acting Director of Human Resource Operations. Mr. O’Gara informed Ms. Gotovich of the Mr. Moreira’s “no re-hire status” with the Lakeville Police Department. (Testimony of Mr. O’Gara)
20. There is no written summary memorializing what information Mr. O’Gara conveyed to Ms. Gotovich about Mr. Moreira’s candidacy. (Testimony of Mr. O’Gara)
21. On September 9, 2013, Ms. Gotovich hand-wrote the following note on the cover sheet of Mr. Moreira’s background investigation: “No based on prior work history, Lakeville PD. EPG 9/9/13.” (Exhibit 4)
22. In a letter dated November 13, 2013, DOC informed Mr. Moreira that he was being bypassed because of his “negative work history” with the Lakeville Police Department. (Exhibit 5)
23. Mr. Moreira filed an appeal of DOC’s decision to bypass him for the position of Correction Officer I on December 2, 2013.

Applicable Law

The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. at 304. “Basic

merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. The Commission must determine whether the Appointing Authority conducted a “reasonably thorough review that confirmed that there appeared to be a credible basis for the allegations” which form “legitimate doubts” about the candidate’s suitability. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 824-826 (2006). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited.

Analysis

The issue here is whether DOC conducted a reasonably thorough review and presented reasons that provide “legitimate doubts” about Mr. Moreira’s suitability to serve as a Correction Officer. They have not.

First, the review process here lacked any involvement by the Appointing Authority or the individual purportedly delegated with the responsibility for making appointments; and lacked any written internal documents (i.e. –written summaries) memorializing how the decision to bypass Mr. Moreira was made.

This is not the first occasion that the Commission has advised DOC of its insufficient vetting process.⁵ In Machnik v. Department of Correction, 26 MCSR 21 (2013), Mr. O’Gara stated that the DOC Commissioner had delegated hiring responsibilities to the Assistant Deputy Commissioner of Administration. As noted in Machnik, there is no provision in the civil service law or rule that allows such a delegation. Even if such delegation were permissible, there was no evidence presented here showing that the Assistant Deputy Commissioner reviewed the reasons for bypass. Instead, it appears that DOC’s Acting Director of Human Resource Operations, who reports to the Assistant Deputy Commissioner, made the decision to bypass Mr. Moreira based on a brief conversation with Mr. O’Gara, a Personnel Analyst. In Machnik, we stated that: “DOC, on a going forward basis, should ensure that the Commissioner fulfills this important responsibility [of making final hiring decisions]”. That apparently did not happen here.

Further, even if Ms. Gotovich were authorized to make final decisions regarding civil service appointments, I am not convinced that Ms. Gotovich: 1) thoroughly reviewed Mr. Moreira’s entire background investigation; and/or 2) understood the context in which the Lakeville Police Chief said he wouldn’t re-hire Mr. Moreira. She did not know, or was not told, that the dispatcher job in question was a part-time job and that Mr. Moreira was, then and now, holding down a full-time job where he has received exemplary reviews. Rather, I have concluded that Ms. Gotovich, as part of a rapid-fire review session with Mr. O’Gara, was told only that Mr. Moreira resigned from a public safety position within the last year and that the Police Chief stated he wouldn’t re-hire Mr. Moreira. The picture painted here is one in which those charged with making final hiring decisions do not thoroughly review a candidate’s entire background and rely almost primarily on the limited information presented regarding an applicant’s potentially

⁵ The Commission is issuing another decision today, Rolle v. Department of Correction, which address similar issues (and concerns).

negative aspects. In short, the hiring process is broken and has resulted in DOC bypassing candidates who, after reviewing their entire background, do not present DOC with any legitimate doubts about their suitability for employment.

Conclusion

For all of the above reasons, DOC has not provided reasonable justification for its decision to bypass Mr. Moreira for appointment as a Correction Officer I. The decision to bypass Mr. Moreira is overturned and his appeal under Docket No. G1-13-259 is hereby ***allowed***.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the state's Human Resources Division (HRD) or DOC in its delegated capacity shall:

- Place the name of Jeff Moreira at the top of any current or future Certification for the position of Correction Officer I until he is appointed or bypassed.
- If Mr. Moreira is appointed as a Correction Officer I, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00974.

This retroactive civil service seniority date is not intended to provide Mr. Moreira with any additional pay or benefits including creditable service toward retirement.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on April 3, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Jeff Moreira (Appellant)

Earl Wilson, Esq. (For Respondent)

John Marra, Esq. (HRD)